SCC File No. 38459

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NOVA SCOTIA)

BETWEEN:

THE ATTORNEY GENERAL OF NOVA SCOTIA representing HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA and THE GOVERNOR IN COUNCIL

APPELLANTS
(Appellants/ Cross-Respondents)

-and-

THE JUDGES OF THE PROVINCIAL COURT AND FAMILY COURT OF NOVA SCOTIA, as represented by the NOVA SCOTIA PROVINCIAL JUDGES ASSOCIATION

RESPONDENTS
(Respondents/ Cross -Appellants)

FACTUM OF THE APPELLANTS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal concerns whether confidential Cabinet documents are relevant and subject to routine disclosure in judicial review of government decisions in response to judicial compensation commission recommendations.

2. This Court's decisions in *PEI Reference* [1] and *Bodner*[2] do not contemplate routine disclosure of any kind. The decisions direct judicial review on a deferential standard of simple rationality focused on whether the government or the legislature provided public reasons for why it has chosen to depart from the tribunal's recommendations. In Nova Scotia, the decision lays with the Executive branch. The reviewing court is required to be deferential to the Executive branch's unique position and constitutional responsibility for the management of the province's finances.

3. In *PEI Reference*, this Court held that decisions concerning judicial salary and benefits be determined through an independent tribunal process making recommendations followed by the government or legislature giving its public response. In *Bodner*, this Court held a tribunal's work must have a meaningful effect and that its recommendations need not be binding. To give meaningful effect to the tribunal process and recommendations, this Court required that, when not accepting all the tribunal recommendations, the government or legislature must publicly justify its decision with legitimate reasons which rely upon a reasonable factual foundation.[3]

4. Judicial review requires the court to consider the government's response from a "global perspective", weighing the "whole of the process" in order to assess whether government has engaged meaningfully with the commission process and given a rational answer to the

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[1] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*PEI Reference"*)
[2] *Provincial Court Judges' Association of New Brunswick v. New Brunswick*, [2005] 2 S.C.R. 286 ("*Bodner*")
[3] *Bodner*, paras. 19-20, 25, 31

tribunal's recommendations. As noted in *Bodner*, it is impossible to draft a complete code for governmental responses and that a court must rely on government's good faith.[4]

5. The Nova Scotia Courts have misinterpreted or misapplied *Bodner* and *PEI Reference* in that they have enlarged the "global perspective" analysis in order to look behind the government's public response and ordered the production of confidential Cabinet documents prepared and submitted by the Attorney General for consideration and debate by Cabinet (the "Report and Recommendation", also the "R&R") before the government issued it's public response by Order in Council of the Governor in Council pursuant to the provisions of the *Act*.[5]

6. By so enlarging the scope of judicial review beyond the public reasons to include a review of how those reasons were formulated within the Executive branch of government, the lower courts have changed the nature of judicial review under *Bodner* to permit an inquiry into the *bona fides* of Cabinet conduct, rather than the published reasons set out by the Governor in Council by Order in Council. This does not lead to judicial review of limited scope but expands the scope of judicial review beyond that contemplated by this Court in *Bodner*. The door to further and protracted litigation between Judges and Government is pushed further open, further politicizing the relationship between the two independent branches and leads to the supplementing of the Record with other documentation to explain and justify reasoned decisions of the Executive, none of which are desirable outcomes. The expansion of the *Bodner* analysis by the Nova Scotia Courts is not necessary to protect judicial independence or the administration of justice in the circumstances of this case.

7. The effect of the Nova Scotia decisions will result in routine disclosure of Cabinet documents, as the Judges' Association did not plead any allegations other than a failure on the part of government to satisfy the *Bodner* test. The Notice for Judicial Review makes no mention of Cabinet or its role and makes no allegation of any misconduct or bad faith on

[4] *Bodner*, paras 38-39
[5] *Provincial Court Act*, R.S.N.S. 1989, C. 238, s. 21K (the "*Act*")

the part of Cabinet or the Attorney General.[6] Compelled production of Cabinet documents in these circumstances is not justified and the resulting negative impact on candour within government communications and upon Cabinet confidentiality will be significant.

8. The Nova Scotia Courts have also misapplied the doctrine of public interest immunity by finding that it does not function to protect the public interest in Cabinet confidentiality in the R&R, failing to properly consider these important values acknowledged by this Court in *Carey*[7] and *Babcock*[8]. The proper consideration of the limited review contemplated in *Bodner* combined with the doctrine of public interest immunity make a stronger case for the application of both in the instant case to maintain the confidentiality of the Cabinet submissions.

B. **Factual Background**

(1) The *Provincial Court Act* & Judicial Compensation

9. Sections 21A through 21N of the *Act* set out the process for determining judicial compensation in Nova Scotia. These provisions require the appointment of an independent Tribunal every three years to report to the Minister of Justice with recommendations respecting salaries and various benefits.[9]

10. The duties of a Tribunal in conducting its work are set out in s. 21E of the *Act*, including the need to take into consideration constitutional law, the need to maintain judicial independence, the need to attract excellent judicial candidates, the nature of a judge's role and of the jurisdiction and responsibility of the court, compensation paid to judges in other jurisdictions in Canada, the need to consider prevailing economic conditions of the Province and the overall state of the Provincial economy, the adequacy of judicial compensation in light of cost of living and the growth or decline in real *per capita* income in the Province.

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[6] Notice for Judicial Review, Appellants' Record, Vol II, Tab A
[7] *Carey v Ontario*, [1986] 2 S.C.R. 637
[8] *Babcock v Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57
[9] *Act*, ss. 21E and 21F

11. Within forty-five days of receipt of the Tribunal report, the Minister of Justice must forward the Tribunal report to the Governor in Council.[10] The Governor in Council then must, without delay, vary or reject each of the recommendations contained in the report.[11] Upon varying or rejecting the Tribunal's recommendations, the Governor in Council shall provide reasons for so doing to both the Tribunal and the Judges' Association.[12] The Governor in Council must also cause the confirmed and varied recommendations to be implemented, such having the same force and effect as if enacted by the Legislature once implemented.[13]

(2) The 2016 Tribunal Report & Governor in Council Reasons

12. The Nova Scotia Provincial Judges' Salary and Benefits Tribunal ("the Tribunal") completed its report on November 16, 2016 and delivered to the Minister of Justice. The Tribunal report was delivered by the Minister of Justice and Attorney General to the Governor in Council on December 19, 2016 for it to confirm, vary, or reject the recommendations contained within. Cabinet also received a confidential submission entitled Report and Recommendation (R&R) from the Attorney General and Minister of Justice (also referred to as "AGNS"), who is the legal advisor to Cabinet. The Attorney General's R&R provided policy and legal advice to Cabinet concerning the Tribunal's report and set out certain policy considerations for her Cabinet colleagues to consider.

13. After Cabinet considered the R&R and deliberated the Tribunal report, the Governor in Council produced Order in Council 2017-24 (the "OIC") on February 2, 2017.[14] The OIC confirmed four of the five recommendations of the Tribunal and varied one of them. The OIC set out comprehensive reasons and background for the Governor in Council's

[10] *Act*, s. 21K(1)
[11] *Act*, s. 21K(2)
[12] *Act*, s. 21K(3)
[13] *Act*, s. 21K(4)
[14] Order in Council 2017-24, Appellants' Record, Vol II, Tab A, pgs 7-19 (attached to Notice of Judicial Review)

confirmation and variance of the Tribunal's recommendations.

(3) The Notice for Judicial Review

14. By Notice for Judicial Review filed March 7, 2017, the Judges' Association sought to quash the OIC on the grounds that the Governor in Council failed to meet the requirements set out in *Bodner* in that the Governor in Council
    (a) failed to articulate in the OIC a legitimate reason for departing from the Tribunal's salary recommendations;
    (b) failed to rely upon a reasonable factual foundation in its reasons for rejection; and
    (c) viewed globally, failed to respect the Tribunal process and ensure that the purposes of the Tribunal – preserving judicial independence and depoliticizing the setting of judicial remuneration – have been achieved.[15]
15. The Judges' Association made no express allegation of bad faith or misconduct against the government or Cabinet, nor was any allegation made alleging non-compliance with the *Bodner* test resulted from the conduct of Cabinet or that such non-compliance was connected to any information placed before Cabinet.

16. The Record of the decision-maker was filed by the Attorney General representing the Governor in Council on May 7, 2017 and served pursuant to Nova Scotia *Civil Procedure Rule* 7. The Record included OIC 2017-24 and the Tribunal's Report for the Period April 1, 2017 to March 31, 2020.

17. By its Motion filed June 5, 2017, the Judges' Association sought production of the R&R as part of the Record of the decision-maker in the Judicial Review on the grounds that the R&R is referred to in the first paragraph of the OIC.[16]

[15] Notice for Judicial Review, Appellants' Record, Vol. II, Tab A, p. 2
[16] Notice of Motion, Appellants' Record, Vol. II, Tab D, p. 24

C. Judicial History

18. In the Courts below, two issues were argued:
    a. Whether the R&R was relevant to the judicial review and should form part of the Record; and
    b. If the R&R was relevant, whether it was not compellable based on public interest immunity or in the alternative, portions of it are protected by solicitor client privilege.

19. The AGNS made other submissions related to the Judges' Association motion to supplement the Record with additional evidence by Affidavit of the Honourable Judge James H. Burrill ("Burrill Affidavit") and related to a consolidation motion made by the Association. However, the only issue before this Court is the issue concerning the R&R.

(1) Supreme Court of Nova Scotia (Justice Ann E. Smith)[17]

20. Smith J. ordered that the R&R to be produced except for content that was subject to solicitor-client privilege. In respect of relevance, Smith J determined that as a general rule any document that was available to a decision-maker and relied on it by in reaching its decision, should form part of the record on judicial review.[18] It appears that Smith, J. relied on an analogy between judicial review records on reviews of an administrative tribunal with constitutionally directed judicial salary compensation decision reviews. Smith J. did not consider the relevance of the R&R to the Judicial Review proceeding beyond noting the Judges' Association position that the OIC referenced the R&R in its opening lines that the Governor in Council confirmed the Tribunal's recommendations 2 to 5 and varies recommendation 1 "on the report and recommendation of the Attorney General and Minister of Justice dated December 19, 2016," and pursuant to Section 21K of the *Act.*[19]

[17] 2018 NSSC 13, Appellants' Record, Vol. I, Tab A, p.1
[18] 2018 NSSC 13, p. 36, para. 108
[19] 2018 NSSC 13, p. 29, para 80; and p. 36, 108

21. In respect of deliberative secrecy of Cabinet, Smith J. held that the R&R did not chronicle discussions of Cabinet members, characterizing the document as "a report from a senior solicitor to Cabinet".[20] Smith J. did not address whether such a determination was consistent with the wording of the OIC characterizing the R&R as a "report and recommendation of the Attorney General and Minister of Justice"[21] and that on her review of the R&R she identified that it is a document "Submitted by: Honourable Diana Whalen, Minister of Justice and Attorney General"[22] to Cabinet. Nor did Smith J consider in her reasons how her finding that the senior solicitor's name appeared only under the "Approvals" heading, amongst others, as "prepared by" the solicitor nor whether such approvals will always result in a finding that a submission by the AGNS to Cabinet would not be considered to be a confidential Cabinet record.

22. In respect of public interest immunity, Smith J held assessed the R&R considering this Court's decision in *Carey* and held the factors analysis did not favour non-disclosure.[23]

(2) Nova Scotia Court of Appeal (Fichaud, Oland and Beveridge JJ.A.)[24]

23. The AGNS appealed on several grounds to the Court of Appeal and the Association cross appealed. The Court of Appeal dismissed the AGNS's appeal and partly allowed the cross-appeal to rule that the contents of para. 22 of Judge Burrill's affidavit are relevant, otherwise dismissing the cross-appeal.

24. Justice Fichaud, writing for the Court of Appeal, found the R&R is relevant for two reasons. First, the OIC in its opening line says the government's position is "on the report and recommendation of the Attorney General and Minister of Justice", thus setting out an aspect

[20] 2018 NSSC 13, p. 38, para. 116
[21] 2018 NSSC 13, p. 29, para 80
[22] 2018 NSSC 13, p. 50, para 148
[23] 2018 NSSC 13, p. 57-58, paras 182-183
[24] 2018 NSCA 83, Appellants' Record, Vol. I, Tab C

of the factual foundation for "Cabinet's consideration of a response to the Tribunal Report", and as the second stage of the *PEI Reference* and *Bodner* test "requires the reviewing court to assess whether the Government's response is based on a reasonable factual foundation, he held the R&R was relevant to the factual foundation. Second, based on *Bodner's* third stage requiring a reviewing court to weigh the whole of the process and the response, the whole process extends beyond just the response, including the R&R as integral to that process.[25]

25. Fichaud J.A. rejected the deliberative secrecy argument on the basis that he agreed with Smith J.'s conclusion that the R&R does not chronicle Cabinet discussions as it is just a report from a senior solicitor to Cabinet.[26] Fichaud J.A. does not address the fact that the R&R is submitted to Cabinet by the AGNS after a process of review by civil servants.

26. Fichaud J.A. rejected the claim of public interest immunity, finding no error in principle or patent injustice arising from the motions judge's analysis.[27] The Court concluded that the R&R which addresses the variation or rejection of a Tribunal recommendation must on balance be compelled to be disclosed in the public interest.[28]

PART II - QUESTIONS IN ISSUE

27. The following are the questions in issue in the appeal:
    1. Is the R&R relevant to the question of whether the *Bodner* test has been met in this case?
    2. Does public interest privilege apply to the documents in this case?
    3. If the R&R is relevant based on *Bodner*, making Cabinet submissions the subject of routine demands for production, how should a reviewing court apply public interest privilege?

[25] 2018 NSCA 83, p.130, paras 33-34
[26] 2018 NSCA 83, p. 131, para 37
[27] 2018 NSCA 83, p. 134, para 46
[28] 2018 NSCA 83, p. 134, para 45

28. The Appellants submit that requiring the Executive branch of government to produce Cabinet material relating to its deliberations on Judicial Compensation Commission recommendations is not required in the absence of allegations of Executive misconduct and bad faith. First, it does not advance the purpose of the constitutional imperatives identified in *PEI Reference* and *Bodner*, which is to preserve judicial independence while depoliticizing the issue of judicial compensation. Second, it undermines the doctrine of public interest immunity. Finally, should there exist allegations of bad faith or serious misconduct on the part of the Executive branch of government, which do not exist in the present case, *Bodner* permits for a confidential review of Cabinet documents to ensure a claim for production of those confidential documents is valid within the context of deferential review of government decision-making. Upon determining the allegations of bad faith are reasonable and supported by *prima facie* evidence, and upon confidential review of the Cabinet documents in issue, a Court has the authority to compel production of such documents on such terms as justice may require in the circumstances.

PART III - STATEMENT OF ARGUMENT

A. Overview of AGNS's Position

29. The scope and meaning of the deferential standard of review in judicial compensation cases lies at the core of judicial independence and separation of powers in Canada. In compelling the production of the R&R, the Nova Scotia courts relied on a misinterpretation of this Court's decisions in *PEI Reference* and *Bodner*. Finding the R&R relevant to the court's assessment of the "whole of the process and the response" goes beyond this Court's analysis of the necessary elements in judicial review and adds review of internal confidences of Cabinet to an analysis otherwise focused on the public process of recommendation and response. Such an approach to judicial review is not required by *Bodner* and results in a less deferential standard of review than this Court thought necessary – it exposes the Executive Branch to unwarranted intrusion by the Judicial Branch into its collaborative, advisory and policy making role. The lower Courts' approach to the *Bodner* analysis unnecessarily

broadens judicial review and sets a course detrimental to the process of setting judicial remuneration.

30. The continuance of such an easy reach into Cabinet confidentiality can only serve to fuel further litigation and politicization between two branches of government in the face of this Court's express effort to reduce such an unwelcome result. Should a Court determine there is anything in a confidential Cabinet document which differs from the content of the public response, further confidential information will have to be disclosed by government to provide necessary context or explanation. In Nova Scotia, as in other Provinces, this has led to litigation between the Government and the Association representing Provincial Court Judges.

31. As noted by Professor Hogg,[29] there exist limitations on the judicial power when reviewing executive power:

> Constitutional law is the law prescribing the exercise of power by the organs of the State. It explains which organs can exercise legislative power (making new laws) executive power (implementing the laws) and judicial power (adjudicating disputes) and what the limitations on those powers are. (part 1 pg. 1)

32. This case engages consideration of what are appropriate limitations on the powers within that relationship in two important ways: first, *via* the deferential and limited review created by *Bodner,* and second, via the doctrine of public interest privilege, which recognizes the value of secrecy to good governance. While *Bodner* demands judicial deference to the decision, there is limited deference to the Executive when determining issues of public interest privilege. When faced with the operation of both constitutional limitations in judicial review of government response to judicial salary tribunal recommendations, the reviewing court must allow for deference and permit the public interest to be accounted for, shielding from review those confidential Cabinet documents not necessary to the fair adjudication of disputes.

[29] *Constitutional Law of Canada* (5th edition Thompson); Appellants Authorities, Tab 1

B. Judicial Compensation Cases from this Court – *PEI Reference* & *Bodner*

33. As noted above, the Executive was operating as a deliberative body, setting policy through the execution of the laws as passed by the Legislature in its formulation of its response to the Tribunal report. This Court, through its formulation of a limited form of judicial review through *PEI Reference* and *Bodner*, requires that deference be accorded to the Executive in the performance of its necessary tasks. The courts below held that the Executive's confidential R&R is relevant to consideration of the "whole of the process", relying on that phrase as used in *Bodner*. A review of the necessary elements of an effective judicial compensation scheme and the intended scope of deference on judicial review follows.

34. Lamer C.J. described the elements of an "effective" judicial compensation scheme which promotes judicial independence in *PEI Reference*. Judicial independence requires "independent, objective and effective" commissions that are tasked with making recommendations on judicial compensation to government.[30] While the recommendations need not be binding on the Legislature or government, they must have a "meaningful effect".[31] Accordingly, the Legislature or government is required to justify any deviation from the recommendations through reasons that are judicially reviewable.

35. The Court held that financial security for the courts as an institution has three components: the salaries of provincial court judges may be reduced, increased or frozen as part of an overall economic measure which affects the salaries of all or some persons paid from public funds; judges can not engage in negotiations with the executive or representatives of the legislature; and, judicial salaries may not go below a basic minimum level of remuneration which is required for the office of the Judge.[32]

36. The Court made it clear the relationship between the legislature, the executive and the

[30] *PEI Reference*, at para. 147
[31] *PEI Reference*, at para. 175
[32] *PEI Reference*, at paras. 131-135

judiciary must be depoliticized, informing us as follows:

> … The legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, the members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.[33]

37. Lamer C.J. identifies that a public, formal response is required by government to a commission's report and that the public, formal response is what is the subject of judicial review:

> 179 What judicial independence requires is that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified amount of time. …
>
> 180 Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary, in a court of law. The reasons for this decision would be found either in the report of the executive responding to the commission's report, or in the recitals to the resolution of the legislature on the matter. An unjustified decision could potentially lead to a finding of unconstitutionality.[34] [emphasis added]

38. The Court held that the standard by which the executive or legislative branch would justify a decision to depart from a recommendation regarding judicial remuneration was one of "simple rationality", a deferential standard under which the government must "articulate a legitimate reason for why it has chosen to depart from the recommendations of the commission".[35] Lamer C.J. explains that a reviewing court does not engage in a searching analysis of the relationship between ends and means, which is a hallmark of a section 1 *Charter* analysis.[36] The Court identifies the effectiveness of the simple rationality test as having two beneficial aspects: first, it screens out decisions with respect to judicial

[33] *PEI Reference*, at para. 140
[34] *PEI Reference*, at paras. 179, 180
[35] *PEI Reference*, at para. 183
[36] *PEI Reference*, at para. 183

remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons, and second, it ensures that decisions are based on a reasonable factual foundation.[37]

39. Thus, changes to remuneration can only be justified for reasons which relate to the public interest and the reasonableness of the factual foundation of the claim made by the government is evaluated in a manner similar to how the Court previously evaluated whether there was an economic emergency in Canada as set out in the Court's jurisprudence under the division of powers.[38] Such an analysis of the factual foundation of a government's claim does not involve the compelled production by government of that upon which it relies, rather what additional or extrinsic evidence government might offer on whether the social and economic circumstances upon which government can be said to have proceeded in acting in furtherance of its legislative mandate.

40. In assessing government's justification for departing from a commission's recommendations, the Court acknowledges that remuneration from the public purse is an inherently political concern and that it is thus important to ensure remuneration decisions do not result in economic manipulation of judges, which would equate to political interference.[39] The Court too acknowledges that measures adopted by government which affect substantially every person who is paid from the public purse will be *prima facie* rational, as they will typically be designed to effectuate the government's overall fiscal priorities and promoting the larger public interest.[40] Measures directed at judges alone, by contrast, may be considered to require "fuller explanation".[41]

41. In the years following the *PEI Reference*, litigation between judges and governments became almost commonplace, and courts struggled to determine the meaning of the simple

[37] *PEI Reference*, at para. 183
[38] *PEI Reference*, at para. 183
[39] *PEI Reference*, at paras. 142-146
[40] *PEI Reference*, at para. 184
[41] *PEI Reference*, at para. 184

rationality standard of review and they applied it in differing ways. This resulting uncertainty led this Court to revisit the issue in *Bodner*.

42. As in *PEI Reference*, the Court in *Bodner* confirmed that government remains the ultimate arbiter of judicial compensation. It can reject or vary tribunal recommendations so long as legitimate reasons are given and that "reasons that are complete and deal with the commission's recommendations in a meaningful way will meet the standard of rationality".[42] Legitimate reasons are compatible with the common law and the Constitution and must be dealt with in good faith.[43] The reasons must show that government has taken into account the commission's recommendations and they must be based on "facts and sound reasoning", articulating the grounds upon which it departs from the recommendations.[44]

43. In *Bodner* this Court unanimously re-affirmed the deferential "simple rationality" standard of review and added a third step to create a three-part analysis:

1. Has the government articulated a legitimate reason for departing from the commission's recommendations?
2. Do the government's reasons rely upon a reasonable factual foundation? and
3. Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration– been achieved?[45]

The first two stages of the analysis were adopted from *PEI Reference*, the third stage was added in *Bodner*.

[42] *Bodner*, at para. 25
[43] *Bodner*, at para. 25
[44] *Bodner*, at para. 25
[45] *Bodner*, at para. 31

44. *Bodner* also reconfirmed that the government's response was "subject to a limited form of judicial review by the Superior Courts" and, in particular:

> The reviewing court is not asked to determine the adequacy of judicial remuneration. Instead, it must focus on the government's response and on whether the purpose of the commission process has been achieved. This is a deferential review which acknowledges both the government's unique position and accumulated expertise in its constitutional responsibility for management of the province's financial affairs.[46]

45. Thus, we see a requirement for a governmental justification that must be clearly and fully set out in a complete public response. The response cannot merely repeat the submissions made to the Tribunal but must show the recommendations were considered and the reasons rely on a reasonable factual foundation.

46. On any subsequent judicial review of the government's reasons, the government "may not advance reasons other than those mentioned in its response".[47] The response must contain all the reasons upon which the government relies.[48] The Court instructs that it is enough, for the purposes of the open and transparent public process, that the government's reasons provide a response to the commission's recommendations which is "sufficient to inform the public, members of the legislature and the reviewing court of the facts on which the government's decision is based and to show them that the process has been taken seriously."[49]

47. The only other material that government is expressly permitted to put forward on judicial review is more detailed information regarding the factual foundation the government has relied upon, such as economic and actuarial data and calculation, or studies of the impact of the tribunal's recommendations to show good faith and commitment to the process.[50]

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[46] *Bodner*, at paras. 29-30
[47] *Bodner*, at para. 27
[48] *Bodner*, at para. 62
[49] *Bodner*, at para. 63
[50] *Bodner*, at paras 27, 36

48. This Court emphasizes a reviewing court's "limited role" on review of government's response, consistent with Lamer C.J.'s urging in *PEI Reference* that the court is not to engage in a "searching analysis of ends and means". The deferential review acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs.[51]

49. The reviewing court is to look at whether it is rational for government to rely on the stated facts or circumstances to justify its response – this is done by examining the soundness of the facts in relation to the position government has adopted in its response.[52] The addition of the third step reinforces that deference be shown to the government as it shifts the focus of the court to the "whole of the process and the response" to determine whether the commission process has been respected and its purposes have been achieved. This was not intended to be an invitation to engage in the review of a different, internal deliberative process by Cabinet and dismiss the required deferential standard of review by compelling the production of confidential Cabinet material not relied upon as the factual underpinning of the public response.

50. On review of the New Brunswick and Alberta governments' responses in *Bodner*, the Court found those responses unsatisfactory in several respects but, in applying a deferential global view of the process and the responses, the Court was able to identify the governments took the process seriously and upheld them.[53]

C. The R&R is not Relevant to the *Bodner* Analysis

(1) Relevance Ought to be Determined by the Pleadings

51. The lower Courts determined the question of scope of the administrative Record without reference to the allegations set out in the Notice for Judicial Review filed by the Judges'

[51] *Bodner*, at para. 30
[52] *Bodner*, at para. 37
[53] *Bodner*, at paras 83, 100 and 130-131

Association. Although what is relevant can only be assessed in relation to the allegations and issues made by the parties in their pleadings, in this case relevance was determined not on any allegation of bad faith but based on the form of the OIC itself requiring reference to an R&R upon which it is published. No specific allegation of bad faith or wrongdoing on the part of the Executive was required to determine the question of whether the R&R was relevant to the limited form of judicial review required in *Bodner*. Instead, the pleading alleged a failure by the government to satisfy the three-part *Bodner* test in its OIC, which would result in the routine compelled disclosure of confidential Cabinet material simply through asserting the failure to meet the constitutionally mandated test without an allegation of bad faith on the part of the Executive in its conduct before the Tribunal or in the production of its justification for departing from the Tribunal's recommendations.

52. How Cabinet conducts itself in its deliberations of advice received from the AGNS and Minister of Justice should not be the subject of judicial review unless the government puts that conduct and advice in issue. The lower Courts have effectively added an additional stage to the *Bodner* analysis under the guise of considering the "whole of the process". The Courts below did not consider that routine judicial review of Cabinet documents would politicize the process or that subjecting such documents to review would imply that while governments fulfill their constitutional obligations in public, they might fail those obligations in private.

(2) *Bodner's* "Whole of the Process" Does Not Expand the Scope of Review

53. The Court of Appeal below recognized Cabinet cannot be analogized to an adjudicative tribunal and that Cabinet's decision of what proposal to put before the Governor in Council is in part a political one in the sense described in *PEI Reference*, involving matters such as fiscal management, spending priorities, and the disbursement of monies from the public purse.[54] Cabinet did not function as tribunal, it did not receive evidence nor did it conduct a hearing. Cabinet is purely a political body, not an adjudicative one. Unlike the asserted

[54] NSCA Reasons at para. 74, Appellants' Record, Vol. I, Tab C

suggestion that the R&R would provide better view of the whole of the process engaged in, there is no request for disclosure of any transcript or minutes of Cabinet or for any other documentation which might be considered relevant to the preparation and publication of the OIC by the Governor in Council. The legal significance of the difference between the political Cabinet and the legal arm of the Executive acting through operation of the Governor in Council was not taken into account by the Courts below, virtually ignoring the difference between political activity at Cabinet meetings and the decisions taken by the Governor in Council as evidenced by promulgation of the OIC.

54. Just as one cannot analogize Cabinet to an adjudicative tribunal, it is equally inappropriate to analogize the Governor in Council to an adjudicative tribunal, particularly when conducting a *Bodner* review of government's reasons for departing from a judicial compensation commission's recommendations.

55. The lower Courts offer no explanation of what a reviewing court is to do with submissions to Cabinet or how the advice given to Cabinet, by itself, is material to the "whole of the process". In the absence of a material pleading of bad faith, this appears to permit for a fishing expedition.

56. In the event Cabinet submissions contain recommendations or information which differ from the public governmental response, the intent of Cabinet members will not be in evidence, inviting further intrusion on Cabinet confidentiality. Further, in the absence of explanation for such differences, other evidence of deliberations may be tendered, further eroding Cabinet confidentiality while expanding the scope of review.

57. An R&R is part of Cabinet's internal deliberative process used to move matters onto the Cabinet's agenda for discussion and further action where merited. It is a mechanism of delivery and advice. Cabinet did not enact the R&R and did not publish it as an integral component of the OIC. The Governor in Council issued and promulgated the OIC as the required response to the Tribunal recommendations and as required by the *Act* and *Bodner*. It is the OIC alone which is the government's response to the judicial review in this case.

58. This Court describes the meaning of "whole of the process" as a reference to the open and public process established in *PEI Reference* intended to replace direct negotiations between judges and governments. It includes the tribunal recommendations delivered to the Minister, the public reasons delivered by government in response to those recommendations, and if the Legislature is the decision-maker, it then includes the public debate and vote in the Legislature. If there is evidence of inappropriate public conduct by the government before the tribunal, a reviewing court may also take that into account. This type of review ensures transparency of the relationship between judges and government by focusing on the public nature of the process.

59. Government is a participant in the process before the commission, taking positions, making submissions, leading evidence. The requirement that a reviewing court weigh the whole of the process and the response to determine whether government has meaningfully and properly engaged in the process requires the court to view the government's response in that context. This Court did not provide in *Bodner* any direction that a reviewing court was to go behind the public reasons and review confidential Cabinet submissions. As noted above, this Court resolved the issues in *Bodner* without finding a need to review Cabinet documents as part of its analysis.[55] There is no mandate for general expansion of the scope of review in *Bodner's* reliance on an examination of the whole of the process.

60. The OIC in this case identifies that the government has publicly articulated legitimate reasons for its one variance from the Tribunal's recommendations. Adherence to the first step of the *Bodner* analysis is not in issue in this case.

61. The second part of the test relates to the extent to which the factual foundations of the government decisions may be examined. It is relevant in this case insofar as it determines whether the cabinet documents in question are relevant to the question of whether the Executive's decision rests upon a reasonable factual foundation. Neither the Notice for

[55] *Bodner*, at paras 83, 100 and 130-131 (see para 50 above)

Judicial Review nor the Notice of Motion to compel production of the Cabinet submission filed by the Judges' Association reference any bad faith nor that the R&R is required to understand the public reasons given in the OIC.

62. Reviewing courts cannot simply assume government engaged in conduct which contravenes *Bodner*. This Court directs that "reliance has to be placed on [the government's] good faith".[56] The pleadings do not allow for such reliance to be rebutted solely based on an allegation the *Bodner* test has not been met. Such a pleading does not support the demand for production of the Cabinet submission to test the Executive's good faith. Should such an allegation be set out in the pleadings, the scope of the Governor in Council's Record could very well be altered to provide for an evidentiary rebuttal of such an allegation.

63. This Court confirms the deferential form of judicial review is not a searching analysis of ends and means. This requires a deferential review of the underlying factual underpinnings of the response, not an attack upon them. The Court in *Bodner* references paragraph 183 of the *PEI Reference* (quoted above) which in turn references the *Anti-Inflation* case. *Anti-Inflation* dealt with the need to determine the facts on which the government relied in order determine whether there was an emergency or not:

> In order to determine whether the legislation here in question was enacted to combat such an emergency, it is necessary to examine the legislation itself, but in so doing I think it not only permissible but essential to give consideration to the material which Parliament had before it at the time when the statute was enacted for the purpose of disclosing the circumstances which prompted its enactment. The most concrete source of this information is, in my opinion, the White Paper tabled in the House by the Minister of Finance and made a part of the case which was submitted on behalf of the Attorney General of Canada.[57]

64. This Court concluded from its review of the White Paper that the Government legitimately believed that the country was in a state of emergency and drew its conclusions from there.

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[56] *Bodner*, at para. 39
[57] *PEI Reference*, at para. 100

65. This Court in *Bodner* elaborates on this approach and notes that the requirement was simply that the government identify the facts it is relying on, and whether it was rational to rely on those facts—not an inquiry into the facts themselves:

> …the reviewing court must determine whether the government has explained the factual foundation of its reasons in its response. Absent new facts or circumstances, as a general rule, it is too late to remedy that foundation in the government's response before the reviewing court. Nevertheless, the government may be permitted to expand on the factual foundation contained in its response by providing details, in the form of affidavits, relating to economic and actuarial data and calculations. Furthermore, affidavits containing evidence of good faith and commitment to the process, such as information relating to the government's study of the impact of the commission's recommendations, may also be admissible.
>
> The reviewing court should also…determine whether it is rational for the government to rely on the stated facts or circumstances to justify its response.[58]

66. Thus, the Court only undertakes a limited review of the facts that were before the Governor in Council, to determine whether their assessment and actions based on those facts were rational. *Bodner* does not require the factual underpinnings of the decision to be attacked.

67. In this case, the analogy to the White Paper from the *Anti-Inflation* case is the Tribunal's reasons. This Court must assess whether, based on the facts presented in those reasons, the government's response was rational. As the foregoing review of the jurisprudence makes clear, there is no authority for lower court's rulings that virtually any and all forms of evidence should be admitted or that relevance is solely determined by whatever an Applicant may choose to plead. The test is focused on the reasons provided by the Governor in Council for rejecting or varying the commission's recommendations. The process also does not envision an examination of the underlying facts determined by the Tribunal.

68. Were it to be otherwise the "limited form of judicial review" would be anything but. It would be a re-litigation of the process that occurred before the Tribunal. This this is not

[58] *Bodner,* at paras. 36 and 37

normally permitted on an appeal, much less on a "limited form of judicial review." Moreover, and of greater concern, this approach to this juridical review would result in the process becoming politicized. The politicization would occur because it would create an incentive for the Executive to craft its briefing documents in a manner that would support their ultimate argument, rather than *vice versa*. If briefing documents are to become evidence, then they will lose their value as briefing documents. This point is elaborated on further in the AGNS's submissions on the public interest immunity, below.

69. The third step added to the test in *Bodner* is new, in that it has no antecedent in the *PEI Reference.* The AGNS submits that *Bodner* did not create a "much broader" review. The Court in *Bodner* laid out useful guidelines as to what the newly added third stage brought to the process to reduce future litigation and uncertainty.[59]

70. In *Bodner*, the Court's focus is on the government's response—i.e. its reasons and the factual foundation for them. The focus is not upon the government's deliberations. On judicial review of governmental decisions concerning judicial compensation setting, courts must focus on the sufficiency of government's reasons, applying an appropriate level of deference to the Executive's response to a judicial compensation tribunal report. Unless there is evidence of inappropriate activity within the Executive's deliberations during a Cabinet meeting, the deliberations within a Cabinet meeting and the otherwise confidential and privileged material before Cabinet for its consideration ought not to be open to scrutiny on judicial review. Courts should be slow to second-guess the policy deliberations of the Executive, particularly where, as in this case, the Executive issued an Order in Council setting out a decision and the reasons for the decision made.

71. A similar case from British Columbia is being heard at the same time as this appeal. That matter flows from a line of cases from that jurisdiction dealing with a similar yet distinguishable issue. Those cases began with *PCJA (BCSC)*[60]. In that case the British

[59] *Bodner*, at paras. 38-39
[60] *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney*

Columbia Supreme Court ordered the production of a Cabinet submission, despite the existence of *Bodner* and public interest privilege, primarily on the ground that this submission had already been referred to in affidavits filed by the government.[61] On appeal, now before this Court, the British Columbia Court of Appeal upheld the decision of the lower court to compel production of a confidential Cabinet document for the reasons set out in *PCJA (BCSC)*, notwithstanding that there had been no reference in an affidavit, but simply on the basis that the situation was similar to the earlier case.[62]

72. The BC cases are distinguishable from the instant case on the ground of the affidavit issue alone; however, the cases also contain an error of logic in that the original cases were premised upon the reference to the Cabinet document in an affidavit in the early cases, but in later cases, when there was no such reference, the Cabinet submissions were still ordered to be produced. The BC cases appear to stand for the proposition that the Judges' Associations do have a "automatic" right to view Cabinet documents regardless of the pleadings and circumstances. For the reasons elaborated on in this Factum, the AGNS disagrees with such an interpretation and application of *PEI Reference* and *Bodner*.

73. In this case the AGNS submits the R&R is not relevant to the application of the *Bodner* test and, therefore, this appeal ought to be allowed and the order compelling production of the R&R ought to be quashed.

74. However, the AGNS also argues that the *Bodner* analysis is sufficiently broad to permit judicial review of confidential Cabinet submissions in certain circumstances, circumstances which do not exist in this case. It would be in keeping with the Court's role in protecting judicial independence and the rule of law to examine the need for production of Cabinet materials where the pleadings properly disclose an issue the resolution of which pointed to the need for such production, such as allegations of inappropriate conduct in connection

General), 2012 BCSC 244 ("*PCJA (BCSC)*")
[61] *PCJA (BCSC)*, at paras. 9-10
[62] *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General)*, 2018 BCCA 394, at paras. 13-14, ("*PCJA (BCCA)*")

with the formulation of government's public response. That the pleadings properly allege misconduct or bad faith requires an evidentiary basis to preclude fishing expeditions. Such serious allegations without some evidence to support them would serve to undermine both the importance of Cabinet confidentiality and the administration of justice. Should a pleading alleging serious misconduct be filed with sufficient evidentiary support, a reviewing Court could then do as the Courts below did – receive the relevant Cabinet documents for private inspection and assess whether they are probative of the issues in the judicial review and may explain the basis upon which the government had chosen to reject a commission's recommendations. Only where the Court makes an assessment that there is *prima facie* evidence of bad faith conduct or other serious misconduct should the Court then order production of the material to the judges' association upon such terms as justice may require in the circumstances.

75. Such an approach in an appropriate case permits for the required deference described in *Bodner* to remain effective while safeguarding the public interest and recognizing the importance of Cabinet secrecy. This kind of approach will address the concerns raised in cases like *Judges of the Provincial Court of Manitoba*,[63] where genuine bad faith conduct was exposed upon the review of Cabinet documents.

76. In summary, the question before this Court is the extent to which the addition of the third step from *Bodner* changes the extent of the Record on judicial review. The AGNS submits that the third step in *Bodner* is intended to allow the Court to consider issues beyond those of "legitimate reasons" or a "factual foundation." This level of flexibility is desirable when considering the important issues of judicial compensation independence. However, the third step of the test is not and should not be considered as an authority to compromise the inner working of the executive. A decision by the Executive should be subjected to a test of simple rationality after having examined the reasons, the facts underlying them, and the global context, as per *Bodner*, but go no further.

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[63] *Judges of the Provincial Court of Manitoba v Her Majesty the Queen*, 2012 MBQB 79 ("*Judges of the Provincial Court of Manitoba*")

D. The Public Interest Privilege Applies to the R&R in this Case

77. Public interest privilege is part of the doctrine of Cabinet secrecy. Cabinet secrecy and public interest privilege are all facets of the same protection afforded to Executive deliberation. As noted by Nicholas D'Ombrain in his article, *Cabinet Secrecy*:

> Secrecy of Cabinet proceedings is one of the cornerstones of the Westminster system of government. The secrecy is protected by convention, the common-law, and – differing degrees- statue law in the principal countries with Westminster systems, notably the United Kingdom, Canada, and Australia.[64]

78. D'Ombrain discusses the convention, not the legal doctrine, but the discussion is nonetheless germane:

> Cabinet secrecy is widely assumed to be akin to executive privilege, shielding all that is internal to the Cabinet. The Cabinet secrecy convention does not protect the substantive secrets of the Cabinet: rather**, it protects the processes whereby the Ministers arrive at decisions.** That is all it protects. The common-law and related statutory provisions **may provide greater protection**, but to the extent that is so, they exceed the scope of the secrecy convention.[65] (emphasis added)

79. Further, as D'Ombrain notes, with the advent of the "modern" cabinet system, these "processes" have changed to create "the cabinet paper system." At pg. 339:

> The advent of the cabinet secretariat changed much in the day-to-day operations of the cabinet. The introduction of civil servants to the Cabinet room, and with them their records, changed the way in which government worked. The Cabinet remained at the core of political forum for the hammering out of agreed policies, but the making of policies was now recorded in progressively greater detail. A system of records grew up in the 1940s and had by the 1950s assumed more or less the skeleton of what we recognize today as the cabinet paper system: a memorandum from the minister outlining a proposed initiative; a cabinet committee agenda, minutes and report on discussion among ministers; and minutes of the

[64] Nicholas D'Ombrain, *Cabinet Secrecy* (Canadian Public Administration Vol. 47 No. 3 Fall 2004, pg. 332-359) , at p. 332 ("D'Ombrain")
[65] D'Ombrain, at p. 334

> cabinet and a record of the decision agreed to. Civil servants from departments began to attend cabinet committees, although it was rare for other than the cabinet secretariat staff to be present at cabinet meetings.

80. Notably, briefing documents sent to cabinet are part of the "cabinet paper system." D'Ombrain notes that the convention of cabinet secrecy is an essential feature of good governance:

> The political and informal character of the cabinet lies at the heart of the conventions of the constitution. The cabinet secrecy convention is the foundation for the maintenance of collective cabinet responsibility, but if cabinet secrecy is to remain part of our constitutional arrangements, it is essential that the cabinet remain the mainspring of government. **Vigilance is required to ensure that the cabinet fulfils its political functions of making responsible government work, for which purposes the protection of its political secrets is not only justified but also essential to parliamentary democracy.**[66] (emphasis added)

81. The importance of the convention and its relationship to the similar legal principal has also been more recently recognized. In Professor Yan Campagnolo's article, *The Political Legitimacy of Cabinet Secrecy*[67], he describes the importance of such confidentiality as follows:

> To force Ministers to settle their policy in public, or prematurely publish their Cabinet documents, would not bolster government openness and transparency; it would rather undermine it, as ministerial discussions would likely move underground, and Cabinet documents would probably cease to exist.

82. The decisions of the Nova Scotia courts did not respect these principles. This case presents the first opportunity for this Court to consider the doctrine of public interest immunity in a context where, but for that immunity, disclosure of Cabinet documents will be routine. The AGNS submits routine disclosure will undermine candour in government communications and the effectiveness of Cabinet decision-making. This will open the door to ministers of the Crown applying to supplement the judicial record by affidavit and supplying their

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[66] D'Ombrain, at p. 353

[67] Yan Campagnolo, *The Political Legitimacy of Cabinet Secrecy* (2017 51 R.J.T.U.M. 51) ("Campagnolo"), see headnote

documentation to justify their deliberation and decision-making, beyond that which is set out in the government's reasons knowing that it will be scrutinized by the judges' associations for use in litigation. The effect of this would further alter the role of the court in judicial review while further politicizing the relationship between government and judges.

83. Here then we can see how the deference contemplated in *Bodner* is related to the need for Cabinet secrecy. The Executive should be afforded the same access and right of confidentiality as other branches of government. To take an example from the judicial branch, if a party to litigation were allowed access to a Judge's private deliberations on a case, they might very well see or hear something that would give them pause and or to question the fairness of the Judge's approach. Although the jurisprudence concerning a reasonable apprehension of bias would govern any such circumstances, this cannot not mean as a matter of course that litigants are entitled to know what goes on within a Judge's chambers. Further, litigants are not entitled to briefings provided by the clerks of the Court; nor are they entitled to internal memoranda, records of discussions of the law between judges, or to sit in upon their private conversations. Rather, when assessing an appeal of a judicial decision, the litigant must review the decision itself and what facts (i.e. the evidence) support it.

84. Prof. Campagnolo also recognizes the link between the convention and the law as follows:

> The legal system also recognizes the link between secrecy and candour. Would persons accused of a criminal act speak freely to their legal counsel, if their words could subsequently be used against them? Would jury members voice their true opinion, if their deliberations were televised? Even Supreme Court judges consider that they need some degree of secrecy to protect the candour of their deliberations. So did, historically, the members of the House of Commons' governing body. All branches of the State rely, to various extents, on this rationale to justify the secrecy of their deliberations. The candour rationale provides a solid foundation for the secrecy convention.[68]

[68] Campagnolo, at p. 67

85. *Carey* is the leading case from this Court on the doctrine of public interest privilege.[69] It involved Ontario's application to quash a subpoena for Cabinet documents based on public interest immunity.

86. Justice La Forest, writing for the Court, considered two rationales for non-disclosure of Cabinet documents. The first, the "candour argument", provides that disclosure of Cabinet documents "would lead to a decrease in completeness, in candour and in frankness of such documents if it were know that they could be produced in litigation and this in turn would detrimentally affect government policy and the public interest".[70] Although La Forest J. was prepared to attach "some weight" to the candour argument, he found its importance was "easy to exaggerate", as he doubted that the "candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation".[71]

87. The second rationale for non-disclosure was based on the "political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only".[72] The Court agreed that the business of government is difficult and that no government could contemplate with equanimity the inner workings of the government machine being exposed to those ready to criticize without knowledge of the background and perhaps with an axe to grind. While agreeing with these concerns, the Court disputed the "absolute character of the protection accorded [Cabinet's] deliberations or policy formulation.

88. The Court developed a list of criteria to strike a balance between the competing interests of preventing harm to the public service and the public interest in the administration of justice.[73] Those criteria are: the nature of the policy concerned; the contents of the

[69] *Carey v. Ontario*, [1986] 2 S.C.R. 637 ("*Carey*")
[70] *Carey*, at para. 44
[71] *Carey*, at para. 46
[72] *Carey*, at para. 49
[73] *Carey*, at para. 22

documents; the level of the decision-making involved; the timing of the disclosure; the importance of producing the documents to the administration of justice; and any allegation of improper conduct by the executive branch towards a citizen.[74]

89. Professor Campagnolo argues in his article *A Rational Approach to Cabinet Immunity under the Common Law* that the approach articulated in *Carey* fails to strike the proper balance among competing interests, leading to repeated and unnecessary disclosure of confidential Cabinet documents.[75] He argues that, since *Carey* was decided in 1986, courts have "almost systematically ordered the production of Cabinet secrets".[76] The relevance of the information has been the main criterion for production. If the court deemed documents to be relevant, production typically ensued. However, Prof. Campagnolo notes it is "unclear whether the production of Cabinet documents was necessary to the fair disposition of any of these cases".[77] While the Court in *Carey* intended to dispel the notion that Cabinet confidentiality was absolute, the Court did not intend to do away with it entirely.

90. This Court re-affirmed the reasons for and importance of public interest immunity in *Babcock*[78]. McLachlin C.J., writing for the majority, recognized the importance of the common law basis for Cabinet confidentiality:

> The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: see *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.), at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making

[74] *Carey*, at paras. 79-80
[75] Yan Campagnolo, "A Rational Approach to Cabinet Immunity under the Common Law", (2017) 55:1 Alta. L. Rev. 43, at pp. 65-67 ("Campagnolo, *Rational Approach*")
[76] Campagnolo, *Rational Approach*, at p. 66
[77] Campagnolo, *Rational Approach*, at p. 67
[78] *Babcock v Canada (Attorney General)*, 2002 SCC 57 ("*Babcock*")

> comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord Salisbury in the *Report of the Committee of Privy Counsellors on Ministerial Memoirs* (January 1976), at p. 13:
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> > A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fulness which belong to private conversations — members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future. . . . The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardise" another, — ever compare his present contribution to the common fund of counsel with a previously expressed opinion. . . .
>
> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario*, [1986] 2 S.C.R. 637, at p. 659, recognized another important reason for protecting Cabinet documents, namely, to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.[79]

91. In *John Doe*[80], a case concerning freedom of information, this Court recognized the practical effect that disclosure of confidential advice to Cabinet has on the candour of such advice:

> … The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.[81]

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[79] *Babcock*, at para. 18
[80] *John Doe v Ontario (Finance)*, [2014] 2 S.C.R. 3, 2014 SCC 36 ("*John Doe*")
[81] *John Doe*, at para. 45

92. In Campagnolo, *Rational Approach*, the author ties the reluctance of lower courts to apply the immunity to three weaknesses in the *Carey* decision:

(a) The Court's definition of "Cabinet documents" fails to differentiate between "core" and "non-core" secrets. Disclosure of core secrets has the potential to extinguish collective ministerial responsibility, i.e. that "the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made". Yet in *Carey*, which featured both core and non-core secrets, all documents were treated the same and ultimately disclosed in the litigation.[82]

(b) The Court gave insufficient weight to the rationales behind Cabinet confidentiality. LaForest J. accepted the possibility that disclosure would encourage "ill-informed or captious public or political criticism" justified Cabinet confidentiality, but no consideration was given to the principle of collective responsibility, which is the "main reason for protection of Cabinet secrecy".[83]

(c) *Carey* gives litigants "a master key to unlock the doors of the Cabinet room".[84] It seems litigants must merely have to allege government misconduct in order to obtain production of confidential Cabinet documents. Accordingly, it is suggested that "the allegations of government misconduct should be supported by some *prima facie* evidence" and "the courts should distinguish between various types of government misconduct with different degrees of gravity (from breach of contract or tortious conduct, to unlawful conduct or a criminal offence)" when assessing whether the public interest favours disclosure of Cabinet documents.[85]

93. Unlike the present case, the Court in *Carey* dealt with allegations of misconduct by Cabinet members which Cabinet sought to defend by claim of privilege. The present case does not

[82] Campagnolo, *Rational Approach*, at pp. 65-66
[83] Campagnolo, *Rational Approach*, at p. 65
[84] Campagnolo, *Rational Approach*, at p. 65
[85] Campagnolo, *Rational Approach*, at p. 66

deal with any alleged misconduct of Crown Ministers, but rather whether the government met the requirements set out in *Bodner*. The Courts below gave no weight to the deliberative candour rationale because it determined the government knew that its response "would be subject to judicial review for legitimacy" according to *Bodner's* criteria.[86] This ensures future confidential Cabinet submissions are made inherently relevant to the *Bodner* test and thus subject to production for judicial review. Such routine production increases the risk that candour in government communications will be impaired in a manner not contemplated by this Court in *Carey.*

94. Routine disclosure of Cabinet submissions increases the likelihood of "ill-informed" criticism form "those ready to criticize without adequate knowledge of the background".[87] The R&R is only a small part of a broader process by which decisions are made, or by which recommendations to the Governor in Council are developed. Production of the R&R creates an incomplete picture which may be then used by others to criticize and invalidate the government's public response. Institutionalization of such an approach to review embraces inherent unfairness in the relationship between the two branches of government.

A. Public Interest Immunity and Solicitor-Client Privilege in the R&R

95. There is no cross-appeal from the Judges' Association to the Court of Appeal determination that specific parts of the R&R contain legal advice to Cabinet for its deliberation, which advice is protected by solicitor-client privilege and thus immune from compelled disclosure. However, one cannot ignore the Judges' Association claim in the Courts below that they are entitled to such privileged advice in the R&R as a component of the concerns expressed above regarding routine disclosure of such Cabinet submissions. Smith J specifically identified the Association's claim as follows:

> … the Applicants say that, similarly, it is necessary to know the legal advice set forth in the Report and Recommendation in order to test the government's position that it acted in good faith in varying the tribunal's

[86] NSCA Decision, at para. 45
[87] *Carey,* at para. 49; and *Babcock,* at para. 18

recommendations.[88]

96. Such a position, it is submitted, will lead to further politicization of the judicial review process. Seeking to "test" the government not by their stated reasons and public conduct, but the desire to test good faith by access to legal advice in the absence of allegations of bad faith not only erodes public interest immunity but the constitutionally protected right of solicitor-client privilege. It is clear in the face of such an approach to this kind of litigation that this Court must articulate meaningful protections for Cabinet confidences in the absence of evidence of bad faith. It is submitted that such a result is consistent with the form of limited judicial review this Court contemplated in its decisions in *PEI Reference* and *Bodner*.

Conclusion

97. The AGNS submits that the R&R and Cabinet documents should not be compelled for production in this case on the basis that the *Bodner* test does not require it. The pleadings and evidence led in this case do not justify it. If the AGNS is correct in its interpretation and application of *Bodner*, this Court need not revisit *Carey* to mitigate against the impact of routine disclosure of Cabinet documents. In the event this Court considers *Bodner* as requiring routine production of confidential Cabinet documents, the AGNS submits the Court must contextualize the elements of *Babcock* and *Carey* within the context of judicial review of judicial compensation cases in such a way as to fully respect the roles of the judicial and executive branches of government while maintaining public interest immunity over those matters not necessary to the adjudication of such compensation cases.

[88] NSSC Decision, at para. 198

PART IV - SUBMISSIONS CONCERNING COSTS

98. The AGNS requests costs its costs of this appeal, and costs in the courts below.

PART V -- ORDERS SOUGHT

99. The Appellants request that their appeal be granted, and an order issued that the documents retain their privileged and confidential status and not be compelled to be produced to the Respondents herein.

All of which is respectfully submitted this 24th day of June, 2019.

Edward Gores, Q.C.
Solicitor for the Appellants, the Attorney General of Nova Scotia and the Governor in Council

Andrew D. Taillon
Solicitor for the Appellants, the Attorney General of Nova Scotia and the Governor in Council

PART VI -- SUBMISSIONS ON CONFIDENTIAL INFORMATION

100. The AGNS has claimed privilege over the documents in question, which to date have not yet been provided to the Respondents and kept separate from the Record with the Nova Scotia courts. They have been filed under seal with this Court. The AGNS requests that should its appeal be granted, the documents in question remain confidential and public access restricted.

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

Cases	**Para. References**
Babcock v. Canada (Attorney General) 2002 SCC 57	90
Carey v. Ontario, [1986] 2 S.C.R. 637	85, 86, 87,88, 93, 94. 95
Judges of the Provincial Court of Manitoba v Her Majesty the Queen, 2012 MBQB 79	75
John Doe v. Ontario(Finance), [2014] 2 S.C.R. 3	91
Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General), 2012 BCSC 244	71
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Provincial Court Judges' Association. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conference des juges du Quebec v. Quebec (Attorney General); Minc v. Quebec (Attorney General), [2005] 2 S.C.R. 286, 2005 SCC 44 ("*Bodne*r")	29, 33, 42, 43, 44, 46, 47, 48, 49, 50, 59, 62, 65, 66, 69, 70
Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373	
Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R v. Ekmecic; R. v. Wickman Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice), [1997] 3 S.C.R. 3	33, 34, 35, 36, 37, 38, 39, 40, 63
Secondary Sources	
Yan Campagnolo, *The Political Legitimacy of Cabinet Secrecy* (2017) 51 RJTUM 51	81, 84
Yan Campagnolo, *A Rational Approach to Cabinet Immunity under the Common Law*, (2017) 55: 1 Alta. L. Rev. 43	55, 89, 92

Peter W. Hogg, *Constitutional Law of Canada* (5th edition Thomson Reuters)	31
Nicholas D'Ombrain, *Cabinet Secrecy* (Canadian Public Administration) Vol. 47 No. 3 (Fall 2004)	77, 78, 79, 80
Statutes & Regulations	
Nova Scotia Provincial Court Act R.S., c. 238, S. 1; 1992, C. 16, S. 18	5, 9, 10, 11